

A New Way Of Looking At Solid Waste

Law360, New York (December 05, 2011) -- The U.S. Environmental Protection Agency has powerful investigatory and enforcement authority over materials deemed “hazardous waste” under the Resource Conservation and Recovery Act.

Pursuant to this authority, the EPA gradually has imposed numerous requirements and restrictions on the generators and transporters of hazardous waste, including requiring EPA identification numbers, the use of hazardous waste manifests identifying contaminants, and written notification of land disposal restrictions, among others.[1]

To satisfy a September 2010 settlement agreement with the Sierra Club, the EPA promulgated a new proposed rule to “revise and clarify” the 2008 RCRA definition of solid waste.[2]

The EPA and numerous stakeholders, including many industry representatives, worked together for well over a decade to finalize the previous 2008 definition of solid waste.

This prior attention to detail was necessary because even minute details concerning the definition of solid waste can dramatically affect how industry operates. The definition of solid waste significantly impacts industry because hazardous wastes are a subset of solid wastes.

As such, if a material does not meet the definition of a solid waste or is excluded from it, then that material cannot be a hazardous waste. If a material is not a hazardous waste, it is not subject to the RCRA’s rigorous Subtitle C requirements.

The new proposed rule threatens to upset the balances that were reached in the 2008 definition. Indeed, many commenters to the EPA’s newly proposed revisions note that the EPA has proposed sweeping changes to a relatively new rule that was over a decade in the making.

Proposed Changes

Under the 2008 definition of solid waste, many secondary materials that are transferred from the generator to other persons for recycling are excluded from the definition of solid waste.[3]

Thus, persons generating, storing and transporting the secondary materials for recycling do not have to comply with the various Subtitle C regulations governing hazardous wastes, even if the materials are considered hazardous under the RCRA.

The EPA has proposed replacing this existing exclusion with an alternative Subtitle C regulation. The new definition requires the recyclable materials in question to be managed according to RCRA Subtitle C requirements, including manifesting the materials and obtaining necessary permits for storing and transporting the materials.

This change would essentially treat hazardous secondary materials intended for recycling as a discarded waste subject to the vast majority of the RCRA's hazardous waste requirements. Commenters have argued that these changes will discourage recycling by making it cost prohibitive, removing all incentive to seek recycling possibilities.

The EPA does, however, propose to retain the solid waste exclusion for hazardous secondary materials that will be reclaimed under the control of the generator — in other words, if the waste generator will reclaim the materials in question itself at the facility in question, they are not waste.

However, the EPA has proposed several new and potentially costly administrative requirements that must be met to qualify for the generator exclusion.

For example, the proposed definition of the housing unit in which hazardous secondary materials must be contained has been expanded to include requirements that it is in “good condition, with no leaks” and that it must be “designed, as appropriate for the hazardous secondary materials, to prevent releases of hazardous secondary materials to the environment.”

The proposed rule clarifies that “such releases may include, but are not limited to, releases through surface transport by precipitation runoff, releases to groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures.”

Not only do these changes add a significant administrative burden for materials that are not being discarded, but commenters also argue that the definition virtually mandates that all hazardous secondary materials be stored in a tank.

In addition, commenters allege that the proposed definition of “contained” qualifies as a preventative measure aimed at preventing the creation of a waste. Because the EPA's authority extends only to existing discarded wastes, the EPA has no authority under the RCRA to promulgate such preventative measures.

The EPA has also proposed significant changes to how the requirement of “legitimacy” applies to recycling activities. These changes include applying the codified definition of legitimacy to all recycling activities regulated pursuant to 40 CFR 260-266, requiring that facilities meet all four federal criteria to show that recycling is legitimate, and mandating documentation of legitimacy.

Industry Opposition to Proposed Changes

Not surprisingly, the recycling, manufacturing, paper and metal industries, among others, are strongly opposed to the proposed solid waste definition. Most industry groups submitted comments raising several procedural objections and technical objections to the proposed rule.

Additionally, a common thread running through the comments focuses on the EPA's continued expansion of the statutory definition of waste. Traditionally, a “solid waste” has been defined by a key two-word phrase in the RCRA statutory definition: discarded material.[4]

However, the EPA's proposed solid waste definition removes many of the recycling-based exclusions from the regulatory definition of solid waste, thereby expanding waste to include items that may not have been discarded by the generator and continue to have value.

Under the proposed regulation, secondary materials considered valuable materials by industry, and thus not discarded, will fall within the definition of solid waste, and thus be subject to the full regulatory scope of the RCRA.

Numerous industry commenters argue that subjecting nondiscarded materials to RCRA requirements directly contradicts Congress's intent, the clear language of the statute and binding case law.

For example, the American Forest and Paper Association wrote in comments dated Oct. 20, 2011, that "[t]o meet the RCRA definition of solid waste a material must be discarded. If it is not discarded, then EPA has no authority under RCRA to regulate it."

William Kovacs, senior vice president for environment, technology and regulatory affairs at the U.S. Chamber of Commerce, argued in comments dated Oct. 20, 2011: "EPA lacks authority under RCRA to regulate recyclables because the statute's plain language limits its reach to 'discarded material' only."

He further explained that a "hazardous secondary material" that is designated for recycling is not discarded, but the EPA erroneously "believes that it may interpret the term 'solid waste' to mean both discarded material and recyclables at the very same time."

In comments submitted on Oct. 20, 2011, the National Association of Manufacturers suggested that under the EPA's proposed formulation, "virtually all recycling of hazardous secondary materials would be presumptively 'illegitimate' unless proven 'legitimate' by the recycling facility. This effort to extend EPA's RCRA jurisdiction over all secondary materials, whether 'discarded' or not, is clearly contrary to law."

Comments submitted on behalf of the Metal Industries Recycling Coalition seem to express the sentiment of many of the commenters by stating: "EPA has proposed a rule the Courts are likely to strike down."

What Happens if the EPA Implements the Rule as Proposed

Historically, industry has been successful at times in attacking the EPA's attempt to expand the meaning of "discarded" in the definition of solid waste under the RCRA.

In 1987, in *American Mining Congress v. EPA*, the D.C. Circuit held that the EPA exceeded its authority by trying to classify materials as a waste that are not "discarded" and thus not considered a waste under the statute.

The D.C. Circuit, which has exclusive pre-enforcement judicial review of RCRA regulations, stated that the RCRA "reveals clear Congressional intent to extend EPA's authority only to materials that are truly discarded, disposed of, thrown away or abandoned," and prohibited the EPA from asserting RCRA jurisdiction over materials that were "not yet ... part of the waste disposal problem."^[5]

Subsequently, the EPA promulgated a rule which imposed storage and other administrative requirements on secondary materials that were slated for recycling. In *Association of American Battery Recyclers v. EPA*^[6], the D.C. Circuit invalidated the EPA rule and reiterated that, "under RCRA, material must be thrown away or abandoned before EPA may consider it to be 'waste.' As we have said, material stored for recycling is plainly not in that category."

Notably, in *Safe Food and Fertilizer v. EPA*, the D.C. Circuit considered whether a material must be considered "discarded" if it is transferred to another firm or industry for recycling.

In this case, the EPA asserted that it had jurisdiction to exempt recycled materials used to make zinc fertilizers from RCRA Subtitle C requirements, because “market participants treat the exempted materials more like valuable products than like negatively valued wastes, managing them in ways inconsistent with discard.”

The court agreed that the EPA had jurisdiction and rejected the idea that a transferred recyclable material is automatically discarded.[7]

The comment period on the proposed rule closed on Oct. 20, 2011. To comply with the terms of its settlement agreement with the Sierra Club, the EPA must take final action on the proposed rule by Dec. 31, 2012.

As of yet, it is unclear whether the EPA will adopt the proposed rule in its current state. However, the tenor of the submitted comments suggests that if it does, the courts will be asked to weigh in on the legality of the revisions.

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[1] 40 C.F.R. §§ 262.12(c), 262.20(a), 268.7(a).

[2] 76 Fed. Reg. 44094 (July 22, 2011).

[3] 40 CFR 261.4(a)(24) and (25).

[4] 42 U.S.C. § 6903(27).

[5] *American Mining Congress v. EPA*, 824 F.2d 1177, 1186 (D.C. Cir. 1987).

[6] *Association of American Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000).

[7] *Safe Food and Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003).